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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-313

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY TENNESSEE, *et al.*,

Petitioners,

—vs.—

ROBERT W. KELLEY, *et al.*,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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Opinions Below

The opinion of the Court of Appeals is now reported at 463 F.2d 732 and is reprinted in the Appendix to the Petition for Writ of Certiorari at pages 25-65. The opinion of the District Court is unreported and appears in the same Appendix at pages 1-24.

Jurisdiction

The jurisdiction of this Court would be properly invoked under 28 U.S.C. § 1254.

Questions Presented

1. Whether the Court of Appeals erred in refusing to overturn the District Court's order directing the implementation of a desegregation plan, upon the basis of allegations of hardship which had never been presented to the District Court.

2. Whether the District Court's use of the system-wide ratio as a guideline in formulating an effective plan of desegregation went beyond that permitted by this Court in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

3. Whether the Court of Appeals erred in holding that petitioners had waived any objections based upon Rule 23, F.R.C.P., or in the alternative that the provisions of the Rule had been complied with.

Constitutional Provisions and Statutes Involved

This case involves the Fourteenth Amendment to the United States Constitution, and particularly the equal protection clause thereof, which provides:

> . . . nor shall any State . . . deny to any person . . . the equal protection of the laws.

This matter also involves the provisions of Rule 23, F.R.C.P.

Statement

The Statement contained in the petition is essentially correct, with the following exceptions:

1. To the extent that the language on page 4, concerning the charts which appear in the District Court's opinion at pages 21-24 of the Appendix, is interpreted as implying that the District Court required a fixed ratio at each school, the Statement is incorrect. The charts to which reference is had were made by the HEW team which submitted a plan at the request of the Court, and simply show the projected results under implementation of the plan drawn by the team. See District Court Opinion at page 10 of the Appendix.

2. The allegations contained within the report reprinted as Appendix D to the Petition were never presented to the District Court nor tested at an evidentiary hearing, although they were controverted by Respondents. Some of those hardships have been relieved, since the filing of the Petition for a Writ of Certiorari, by an order of the District Court directing the school authorities to purchase additional buses in order that all students might leave schools to return home not later than 4:00 p.m.

A more thorough history of this case is found in the opinion of the Court below, particularly at pp. 27, 28-46 of the Appendix to the petition.

Reasons for Denying the Writ

I.

The School Board first argues that the order of the District Court, affirmed by the judgment below, exceeded the bounds of its discretion under *Swann, supra,* because of the hardships imposed upon students by the plan. The Board failed to demonstrate to the District Court, prior to the entry of the order, that its good faith implementation would create such problems, but instead attacked the order

on appeal with an untested affidavit of the Superintendent describing various difficulties alleged to have resulted in the implementation of the plan. The Court of Appeals refused to overturn the District Judge but did remind the school board that "an injunctive decree in a school segregation case is always subject to modification on the basis of changed circumstances."

With that background, it is nothing short of preposterous for the school authorities to ask this Court, without any record basis whatsoever, to reverse the well considered orders of a District Court and Court of Appeals on the basis of hypothetical allegations which it ought to be very easy for the school authorities to substantiate.

II.

Like other school systems which have sought review of school desegregation orders this Term, Petitioners make the flat and bald assertion that the District Court ordered racial balance. Not only did the District Court explicitly eschew such a course of action, and not only did the Court of Appeals pointedly affirm on this issue, but even a cursory glance at the projected enrollment statistics at pages 21-24 of the Appendix to the Petition demonstrates a considerable variation among the percentage of black and white students to be assigned to each school—from 0% black to 41% black in the elementary schools alone. The "Report" filed by the Superintendent on October 19, 1971 does not set out the actual enrollment figures achieved when the plan was implemented but respondents have no reason to suspect that in fact a perfectly even racial distribution resulted.

III.

The purported issue under Rule 23, F.R.C.P. is absolutely frivolous, as the opinion below makes perfectly clear and we shall not detain the Court with elaborate arguments.

CONCLUSION

Wherefore for the foregoing reasons respondents respectfully pray that the petition be denied.

Respectfully submitted,

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